Supreme Court, U.S.
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No. 95-258

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In The

Supreme Court of the United States

October Term, 1995

JAMES E. JONES, JR., *et al.*,

Petitioners,

v.

SHANNON RICHEY FAULKNER,

and the *Petitioner,*

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

M. DAWES COOKE, JR.
BARNWELL, WHALEY, PATTERSON & HELMS
134 Meeting Street
Charleston, South Carolina 29402
(803) 577-7700

ROBERT H. HOOD
HOOD LAW FIRM
172 Meeting Street
P. O. Box 1508
Charleston, South Carolina 29402
(803) 577-4435

*Counsel of Record

CHARLES J. COOPER*
MICHAEL A. CARVIN
VINCENT J. COLATRIANO
DAVID H. THOMPSON
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

CHARLES MOLONY CONDON
Attorney General for the State of South Carolina
TREVA G. ASHWORTH
KENNETH P. WOODINGTON
CAMERON B. LITTLEJOHN, JR.
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In this equal protection case challenging the males-only admission policy of The Citadel, the Military College of South Carolina, the questions presented are:

1. Did the courts below exceed Article III's "case or controversy" limitations on federal judicial authority by adjudicating the constitutionality of South Carolina's failure to provide an all-female military program like The Citadel, given that the plaintiffs not only did not seek the provision of such an all-female program, but consistently and unequivocally renounced it.

2. If the courts below did have jurisdiction over the issue, does a demonstrated and undisputed lack of *any* demand for an all-female military program like The Citadel provide a constitutionally adequate justification for South Carolina's failure to establish such a program.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties in the courts below and join in this petition as additional petitioners: David M. Beasley, Governor of the State of South Carolina; Stanhope Spears, Adjutant General of the State of South Carolina; Barbara S. Nielsen, Superintendent of Education of the State of South Carolina; William F. Prioleau, Jr.; William E. Jenkinson III; Leonard F. Fulghum, Jr.; James M. Leland, Jr.; John A. McAllister, Jr.; David S. Boyd, Jr.; Julian G. Frasier III; James W. Bradin; Larry J. Ferguson; Steven D. Peper, Members of The Board of Visitors of The Citadel, the Military College of South Carolina; Ronald F. Gaskins, Interim Director of Admissions and Recruiting at The Citadel, the Military College of South Carolina; Claudius E. Watts III, President of The Citadel, the Military College of South Carolina, in their official capacities; The State of South Carolina; The Citadel, the Military College of South Carolina; and The Board of Visitors of The Citadel, the Military College of South Carolina.

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JAMES E. JONES, JR., *et al.*,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners James E. Jones, Jr., *et al.*, respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, entered on April 13, 1995.

I. OPINIONS BELOW

The opinion of the court of appeals for which review is sought is reported at 51 F.3d 440 (4th Cir. 1995) ("*Faulkner II*") and is appended to the petition for writ of certiorari filed with this Court on July 10, 1995 by Shannon Richey Faulkner, plaintiff below. Petition for Writ of Certiorari at 1a-32a, *Faulkner v. Jones*, (U.S. July 10, 1995) (No. 95-31) ("Faulkner Petition" or "Faulkner Pet."). The opinion of the United

States District Court for the District of South Carolina is reported at 858 F. Supp. 552 (D.S.C. 1994) and is appended to the Faulkner Petition at 33a-66a.

The order of the district court, dated August 17, 1993, granting Faulkner's motion for a preliminary injunction is unreported and is appended to the Faulkner Petition at 69a. The decision of the Court of Appeals, dated November 17, 1993, affirming the district court's grant of the preliminary injunction is reported at 10 F.3d 226 (4th Cir. 1993) ("*Faulkner I*") and is appended to the Faulkner Petition at 70a-100a. The decision of the Court of Appeals, dated January 11, 1994, denying petitioners' motion for a stay of the mandate in *Faulkner I* is reported at 14 F.3d 3 (4th Cir. 1994) and is appended to this petition as Appendix C (App. 15-20).

II. JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1995. On June 30, 1994, The Chief Justice granted petitioners an extension of time, through and including August 11, 1995, for the filing of a petition for writ of certiorari. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 2 of Article III of the United States Constitution provides, in pertinent part, that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . . "

IV. STATEMENT OF THE CASE

The litigation of this equal protection case has trailed closely behind, and in certain important respects has been governed by, the Fourth Circuit's decisions in a virtually

identical challenge to the single-gender admission policy of the Virginia Military Institute ("VMI"), the only other public males-only college remaining in this country. *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992) (*VMI I*), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2431 (1993); *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (*VMI II*), *petition for cert. filed*, No. 94-1941 (April 23, 1995). It is thus necessary to first describe briefly the relevant features of the *VMI* case.

A. The *VMI* Litigation

1. The United States brought an equal protection action against VMI in 1990, seeking the admission of qualified women to its all-male Corps of Cadets. After a six-day trial, the District Court for the Western District of Virginia, applying the standard enunciated by this Court in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (*Hogan*), upheld VMI's males-only admissions policy as substantially related to an important governmental interest. Based on undisputed expert testimony and studies establishing that single-sex education is pedagogically justifiable for both male and female college students, the district court held that VMI's males-only policy was substantially related to the important state objectives of increasing educational diversity and of providing the "substantial educational benefits" of single-sex education, particularly the VMI "adversative" military-style educational method. *United States v. Virginia*, 766 F. Supp. 1407, 1413, 1415 (W.D. Va. 1991). The district court also found that if VMI became coeducated, not only would the pedagogical benefits of single-sex education be lost to both sexes, but the physical and developmental differences between men and women would require "dual tracking," and ultimately abandonment, of VMI's harsh adversative system – an educational methodology that reduces the cadets to an as-equal-as-possible status by physical and mental adversity, stress, deprivation of privacy, and minute regulation of behavior. *Id.* at 1412-13. Finally, because "[t]he relief that the United States seeks in this suit is to require VMI to open its doors to women – not to force Virginia to establish an all-

female, state-supported college," the district court noted that any question relating to Virginia's failure to provide an all-female VMI-type educational program was "not an issue to be resolved in this lawsuit." *Id.* at 1415.

In *VMI I*, the Fourth Circuit affirmed the district court's findings relating to the pedagogical benefits of single-gender education and to the detrimental effect that coeducation would have upon VMI's unique program. Specifically, the Fourth Circuit upheld the district court's findings that single-sex education is "pedagogically justifiable" and that VMI's holistic, adversative system of education for men is "even more so." *VMI I*, 976 F.2d at 898. Indeed, the court affirmed the district court's findings "that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology." *Id.* at 897. As the court of appeals explained: "It is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI." *Id.* at 897. These and similar findings yielded the conclusion "that if a court were to require the admission of women to VMI to give them access to this unique methodology, the decision would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation." *Id.*

Notwithstanding its conclusion that VMI's males-only admission policy is constitutionally justified, the court ruled against the Commonwealth on the "larger question," raised *sua sponte* by the court itself, of whether Virginia had adequately justified why it offered the unique educational benefits of a single-sex VMI-type education to men but not to women. *Id.* at 898-99. The Fourth Circuit determined that the policy of educational diversity, the only justification offered by the Commonwealth, was not advanced by offering a single-sex VMI-type program to males only. With respect to remedy, the court suggested that the Commonwealth could

either coeducate VMI, "establish parallel institutions or parallel programs" for women, "abandon state support of VMI," or pursue "other more creative options or combinations." *Id.* at 900. The court thus directed the district court on remand "to require the defendants to formulate, adopt, and implement a [remedial] plan . . . . " *Id.* The Fourth Circuit stayed its mandate pending the filing of a petition for writ of certiorari. This Court later denied VMI's petition for certiorari. *Virginia Military Inst. v. United States*, ___ U.S. ___, 113 S. Ct. 2431 (1993).

2. On remand, Virginia chose to provide a single-gender program to women through the creation at Mary Baldwin College, an historically all-female private undergraduate institution, of a state-supported program known as the Virginia Women's Institute for Leadership ("VWIL"). Like VMI, the VWIL program was designed to produce "citizen soldiers" through a holistic program of single-gender undergraduate education with military training. The district court approved Virginia's VWIL plan, although the VWIL program differed significantly from VMI in its educational methods and academic offerings and requirements. *United States v. Virginia*, 852 F. Supp. 471 (W.D. Va. 1994). The court credited testimony that an all-female institution based strictly upon the adversative "VMI model" was not "achievable from the public policy perspective because it is deficient from the standpoint of attracting a sufficient clientele and from the standpoint of achieving a reasonable degree of acceptance from the Commonwealth." *Id.* at 481.

The United States appealed, and in *VMI II* the Fourth Circuit affirmed the district court's decision approving the VWIL remedial plan. In reaching this decision, the court established a new "special intermediate scrutiny test" for assessing the constitutionality of single-gender educational programs. In addition to satisfying *Hogan*'s intermediate scrutiny standard, the court of appeals required Virginia to demonstrate that "the alternatives available to members of each gender denied benefits by the classification" are "substantively comparable." *VMI II*, 44 F.3d at 1237. Applying this test to VMI's single-gender admission policy, the court of

appeals first reaffirmed its decisions in *VMI I* that "providing the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education," *id.* at 1238, and that the males-only admissions policy is "the only way to realize the benefits of homogeneity of gender" and to "achieve the results of an adversative method in a military environment." *Id.* at 1239. Accordingly, "[i]f we ordered VMI to admit women, the program would be irrevocably altered, forever denying its unique methodology to both women and men." *Id.* at 1240. *See also id.* at 1239.

Turning to the third step of its "special intermediate scrutiny" test, the court of appeals concluded that the benefits offered to men by VMI and to women by VWIL are "substantively comparable." Noting that the differences in the two programs were "attributable to a professional judgment of how best to provide the same opportunity," the Court concluded that "the mission and goals [of the two programs] are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution." *Id.* at 1241. The court relied on expert testimony that an all-female program that was identical to VMI would be impracticable because women may not respond similarly to an adversative educational approach and because such a program "would attract an insufficient number of participants to make the program work." *Id.* at 1241.

The United States has petitioned this Court for a writ of certiorari seeking review of *VMI II*. The VMI defendants have opposed the United States' petition for certiorari, but have filed a "Conditional Cross-Petition" for writ of certiorari. Both the United States' petition and the VMI defendants' conditional cross-petition are pending.

B. The Citadel Litigation

1. On March 2, 1993, Faulkner[1] commenced this action against The Citadel and its governing bodies and officers. Faulkner's complaint alleged that she had been denied admission to The Citadel Corps of Cadets based on her gender, that this denial violated her rights under the Equal Protection Clause, and that she is entitled to a permanent injunction compelling The Citadel to abolish its single-gender admissions policy and to admit her to the Corps of Cadets. On June 7, 1993, the district court granted the motion of the United States to intervene in this action in support of Faulkner and to add South Carolina as a defendant. The United States likewise sought only the abolition of The Citadel's single-gender admissions policy and the admission of qualified women to the Corps of Cadets.

On July 7, 1993, Faulkner moved for a preliminary injunction compelling her admission to day classes at The Citadel beginning in the 1993 fall semester. Faulkner expressly did not seek interim admission to the Corps of Cadets. The district court granted Faulkner's motion, but made clear that it would not have granted a preliminary injunction compelling Faulkner's interim admission to the Corps of Cadets.

The court of appeals, by a divided vote, affirmed the grant of preliminary injunctive relief. *Faulkner v. Jones*, 10 F.3d 226, 234 (4th Cir. 1993) (*Faulkner I*) (Faulkner Pet. 70a-100a). Like the district court, the panel majority concluded that admitting Faulkner to *day classes only* "does not require structural changes to The Citadel's program" and "is not tantamount at this time to integrating or altering the military program at The Citadel." *Id.* at 233 (Faulkner Pet. 79a). The panel majority also made clear that the Fourth Circuit's findings in *VMI I* regarding the benefits of single-

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[1] For the sake of clarity, we refer to Faulkner, who has also filed a certiorari petition in this case, simply as "Faulkner," to respondent United States as "United States," and to both of them collectively as "plaintiffs." We refer collectively to The Citadel and the State of South Carolina as "defendants."

gender education and the adverse effects of coeducation at VMI would apply no less in this virtually identical case. *Id.* at 232 (Faulkner Pet. 78a). Thus, the panel majority reaffirmed the Fourth Circuit's earlier finding that "with respect to both VMI's military and educational aspects, . . . a single-gender policy was justified by an important state purpose and . . . the state could appropriately offer a single-gender military education." *Id.* at 231-32 (Faulkner Pet. 76a). The court also reaffirmed its conclusion in *VMI I* that "coeducation would so fundamentally change VMI's military program that neither males nor females would receive the training which VMI offered through its single-gender program." *Id.* at 231 (Faulkner Pet. 76a).

In remanding the case to the district court for a trial on the merits, the court noted that South Carolina had thus far provided "no explanation for the failure to offer women the same opportunity to participate in a single-gender institution and achieve similar goals as that afforded to men at The Citadel." *Id.* at 232 (Faulkner Pet. 78a). The court made clear, however, that the issue of sufficient demand for an educational opportunity is relevant to that inquiry:

> [A]ny analysis of the nature of a separate facility provided in response to a justified purpose, must take into account the nature of the difference on which the separation is based, the relevant benefits to and the needs of each gender, *the demand (both in terms of quality and quantity)*, and any other relevant factor.

Id. at 232 (Faulkner Pet. 77a-78a) (emphasis added).

The Citadel unsuccessfully sought rehearing and a stay of the court of appeals' mandate. *Faulkner v. Jones*, 14 F.3d 3 (4th Cir. 1994) (App. C); *Jones v. Faulkner*, ___ U.S. ___, 114 S. Ct. 872 (1994).

2. In light of the Fourth Circuit's rulings in *Faulkner I*, the district court limited the liability portion of the trial to the adequacy of "justification" for not offering an all-female military program like The Citadel to women. *Faulkner v. Jones*, 858 F. Supp. 552, 555 (D.S.C. 1994) (Faulkner Pet. 36a). The undisputed evidence demonstrated that the current

absence of such a program results not from intentional discrimination against women in higher education, but from an absence of any significant demand on the part of women to support such an institutional program.[2] In its findings of fact, the district court specifically concluded that "[i]t is and has been the policy of the State of South Carolina to provide educational opportunities in its system of higher education when dictated by its policies of responding to reasonable demand, student choice, institutional autonomy, diversity, and economy of resources." *Id.* at 560 (Faulkner Pet. 46a); *see also id.* at 564 (Faulkner Pet. 54a). The district court also specifically found that "[t]here does not appear to be any substantial interest in South Carolina for the establishment of an all-female military institution like The Citadel." *Id.* at 560 (Faulkner Pet. 46a). Notwithstanding these findings, the district court concluded, as a matter of law, that the level of demand for an all-female Citadel is irrelevant as a justification for South Carolina's failure to provide such an institution. *Id.* at 564-65 (Faulkner Pet. 55a-57a), citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *McCabe v. Atchison, T. & S. F. Ry.*, 235 U.S. 151 (1914). Accordingly, the district court held that the State had violated the Equal Protection Clause.

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[2] This evidence included the testimony of two former governors of South Carolina, two members, including the chairman, of the Legislative Study Committee on Single-Gender Educational Opportunities for Women ("Committee"), the chairman of the South Carolina Commission on Higher Education, and a professor of educational leadership and policy studies at Arizona State University. The State also introduced the report of the Committee, a ten-member committee established by the General Assembly to study and evaluate single-gender educational opportunities for women. J.A. 1105. ("J.A." refers to the Joint Appendix filed in the court of appeals in *Faulkner II*). The Committee's report, which was accepted by the General Assembly, notes that "the Committee found no indications of interest by women in a single-gender military education." J.A. 1120. The Committee's report also noted that South Carolina had supported single-gender education for women at Winthrop College from its founding in 1891 until 1974, when, due to a marked decline in student demand and enrollment and to a resulting desire to serve a broader student population, it obtained legislative authorization to become coeducational. J.A. 1084-85.

Turning to the issue of remedy, the district court ordered that Faulkner be admitted immediately to The Citadel Corps of Cadets. With respect to women other than Faulkner, the court ordered that defendants formulate, adopt, and implement a remedial plan that conforms with the Equal Protection Clause by the beginning of the 1995-96 school year. *Id.* at 569 (Faulkner Pet. 65a-66a).

After granting a stay of the district court's order directing Faulkner's immediate admission into the Corps of Cadets, *Faulkner v. Jones*, No. 94-1978, slip. op. (4th Cir. Aug. 12, 1994) (Faulkner Pet. 102a-103a), a divided panel of the Fourth Circuit affirmed. *Faulkner II*, 51 F.3d at 450 (Faulkner Pet. 18a). The court reaffirmed and readopted its holdings in *VMI I*, *Faulkner I*, and *VMI II* regarding the benefits and importance of single-gender education, the adverse effects upon institutions such as VMI and The Citadel of coeducation, and the need for a state to justify the maintenance of a single-gender educational program without providing a substantively comparable program for members of the other gender. *Id.* at 443 (Faulkner Pet. 3a-4a).

On the issue of South Carolina's justification for not offering an all-female military program like The Citadel, all three members of the panel had a different view concerning the relevance of the State's evidence of a lack of student demand. Judge Hall, in a concurring opinion, expressed the view that The Citadel's males-only admission policy is *per se* unconstitutional and that any inquiry into the State's failure to provide a parallel institution for women is therefore "irrelevant." *Id.* at 450-51 (Faulkner Pet. 18a-20a). Judge Niemeyer, who authored the lead opinion, voiced disagreement with the district court's legal conclusion that student demand is irrelevant to the equal protection analysis, but decided that the issue need not be resolved because the State had not presented evidence "that there was an absence of demand among women for public single-gender education." *Id.* at 444-45 (Faulkner Pet. 6a-8a). Judge Niemeyer thus defined the relevant inquiry as whether there was significant female demand "for public single-gender education" in general, rather than for an all-female military program like The Citadel. Judge Hamilton, in

dissent, focused on the absence of student demand for an all-female military program like The Citadel, finding that the "record more than adequately supports [defendants'] position; indeed, Faulkner conceded this point, and the district court found it as a fact. There is simply and indisputably *no* demand in South Carolina for a Citadel-type educational program for women." *Id.* at 455 (Faulkner Pet. 28a). (Hamilton, J., dissenting) (emphasis in original). Judge Hamilton also concluded that requiring the State to establish an all-female educational program "is doubly futile because Faulkner has repudiated both remedies, *i.e.*, a program similar to VWIL and a 'female Citadel.' " *Id.* at 456 (Faulkner Pet. 30a).

The panel majority modified the district court's remedy decision, ordering that unless South Carolina provided by August 1995 an all-female educational program that met the criteria of *VMI II*, Faulkner must be admitted into the Corps of Cadets. *Id.* at 450 (Faulkner Pet. 18a). With respect to all other women, the court of appeals remanded the case with instructions that the district court establish a schedule for South Carolina to formulate, adopt, and implement a remedial plan. *Id.*

3. Since the issuance in April of the Fourth Circuit's decision in *Faulkner II*, defendants have sought to comply with the decision by doing everything within their power to ensure that an all-female program meeting the requirements announced in *VMI II* would be devised, adopted, approved, and implemented by August 12, the day on which new Cadets are required to report to campus. On June 5, defendants submitted to the district court a proposed remedial plan proposing the creation of the South Carolina Institute of Leadership for Women ("SCIL") at Converse College, an historically all-female private undergraduate institution. Modeled closely on VWIL, SCIL was designed by experts in women's education to provide women a publicly supported, single-gender program of undergraduate education with military training. Like VWIL, the SCIL program does not incorporate the adversative educational method and differs from The Citadel in certain other respects. Defendants have also taken significant steps to implement the proposed remedial plan so that the

SCIL program could be operational by the fall 1995 semester. Thus, Converse has entered into contracts with South Carolina and The Citadel for the establishment of the SCIL program. Defendants have also provided for funding for the SCIL program. The Citadel has provided initial funding of $5 million, and has agreed to provide additional funding in the future. In addition, on June 13, 1995, the South Carolina General Assembly passed a budget bill which includes the necessary recurring and nonrecurring appropriations for the SCIL program.

Despite these efforts, however, the district court, in an order issued July 24, "conclude[d] that it cannot consider the issues relating to the approval and implementation of South Carolina's Proposed Remedial Plan prior to August 12, 1995." Accordingly, the district court ordered The Citadel to admit Faulkner to the Corps of Cadets on August 12.[3]

V. REASONS FOR GRANTING THE PETITION

While the parties to this case have agreed on nothing else, they are united in the view that this case raises questions of exceptional national importance amply warranting this Court's review. Last month, Faulkner filed a petition for writ of certiorari, arguing essentially that she is entitled under the Equal Protection Clause to admission to The Citadel's Corps of Cadets and that the Fourth Circuit erred in authorizing the State of South Carolina to remedy its alleged constitutional violation by establishing an all-female educational program "substantively comparable" to The Citadel. *See* Faulkner Petition at 14. The United States, which is an intervening plaintiff in this case and is the sole plaintiff in the *VMI* case, is advancing largely the same argument in a certiorari petition seeking review of the Fourth Circuit's decision in *VMI* approving the establishment of the Virginia Women's Institute

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[3] Although the district court has not yet conducted a remedial trial, Converse College will commence the SCIL program on September 1, 1995. As of August 4, 1995, 41 young women have applied for admission to SCIL, and 23 have been admitted for the 1995 fall semester.

for Leadership at Mary Baldwin College to remedy the Commonwealth of Virginia's purportedly unconstitutional decision to offer " 'the unique benefits of a VMI-type education to men and not to women.' " *See* Petition for Writ of Certiorari at 6, *United States v. Virginia*, (April 23, 1995) (No. 94-1941) ("U.S. Petition"), quoting *VMI I*, 976 F.2d at 899.

We, too, believe that this case warrants plenary review, but for other reasons. The truly certworthy questions presented by this case, however, relate to the issue of liability, rather than remedy. They are: (1) did the courts below exceed their jurisdiction in this case by reaching the issue of whether the absence of an all-female military program like The Citadel is constitutionally justified, and (2) if the courts below did have jurisdiction over the issue, does a demonstrated and undisputed lack of *any* demand for an all-female military educational program like The Citadel provide a constitutionally adequate justification for the State's failure to establish such a program.

With respect to the question of justiciability, throughout this litigation, from the filing of her complaint to the filing of her certiorari petition, Faulkner has sought only one thing: admission to The Citadel's Corps of Cadets. She has not challenged South Carolina's failure to provide an all-female educational program like The Citadel's. To the contrary, she has made emphatically clear that she would not be interested in attending an all-female Citadel even if one existed and that she will not enroll in any all-female program that South Carolina may develop pursuant to the Fourth Circuit's ruling in this case. Similarly, the United States' complaint-in-intervention alleges only that The Citadel's exclusion of qualified females from the Corps of Cadets violates the Equal Protection Clause, and it has consistently maintained that admission of Faulkner and other qualified females into the Corps is the only appropriate remedy. The court of appeals, having concluded that The Citadel's males-only admission policy satisfies the equal protection standard established by this Court in *Hogan*, fully resolved the only claim placed before it – and the only claim that these plaintiffs had standing to place before it. There is not now, and never has been, a

"case or controversy" between the parties to this litigation on the entirely distinct question, injected *sua sponte* into this case by the court of appeals, whether the State of South Carolina is constitutionally obliged, in light of The Citadel's males-only admission policy, to establish an all-female military program like The Citadel.[4]

Quite apart from the fact that the courts below adjudicated a constitutional claim that no one has made, they decided that claim incorrectly. For even if Faulkner had complained about the absence of an all-female military institution like The Citadel, the State established at trial an "exceedingly persuasive justification" for its failure to establish such a program for women. As Judge Hamilton put it in dissenting from the decision below: "There is simply and indisputably *no* demand in South Carolina for a Citadel-type educational program for women." *Faulkner II*, 51 F.3d at 455 (Faulkner Pet. 28a) (Hamilton, J., dissenting) (emphasis in original). If the court of appeals was correct in holding that The Citadel's males-only admission policy is constitutionally justified, and we submit that it was, it follows as a matter of common sense that the State is not constitutionally precluded from providing to males a pedagogically beneficial single-sex educational program for which there is large student demand, on the ground that the State does not also offer to females the same single-sex educational program for which there is no significant demand.

The short of our petition is this: if there is any room at all under our Constitution for public single-sex higher education, then surely The Citadel's Corps of Cadets qualifies. Before

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[4] The justiciability in this case of the "claim" challenging the absence of an all-female military program like The Citadel bears on the subject matter jurisdiction, under Article III, of the courts below and of this Court. Accordingly, this Court can reach the issue even though it was not raised or addressed below. *See, e.g., United States v. Hays*, ___ U.S. ___, 63 U.S.L.W. 4679, 4681 (1995); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990). *See also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260 (1977); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

The Citadel's 153-year old single-sex policy, and its acknowledged pedagogical benefits, passes into history, this Court should review and determine the merits of the issues raised in this case.

A. There Is No Justiciable Issue In This Case Concerning The Absence Of An All-Female Military Institution Like The Citadel

1. The exclusive purpose of this lawsuit is described succinctly in the opening paragraph of Faulkner's complaint: "Plaintiff seeks admission to The Corps of Cadets." App. 2. Alleging that The Citadel had initially accepted her application for admission until it learned her sex, Faulkner's complaint makes a single legal claim – that defendants "in denying Plaintiff admission to the Corps of Cadets, discriminate[d] against the Plaintiff on the basis of sex in violation of the Equal Protection Clause . . . ." App. 6. Her prayer for injunctive relief sought only an order admitting her to The Corps of Cadets and enjoining the defendants "from discriminating on the basis of sex in admitting qualified women to the Corps of Cadets." App. 7. The United States' complaint-in-intervention, likewise, is concerned solely with The Citadel's "policy of restricting admission to . . . the Corps of Cadets . . . to males only . . . ." App. 12. The United States specifically sought an order declaring unconstitutional The Citadel's policy of "refusing to admit or consider the admission of qualified females to The Citadel" and enjoining the defendants from discriminating on the basis of sex "in the operation of The Citadel." App. 13. Neither complaint contains an allegation relating in any way to South Carolina's failure to establish an all-female military program like The Citadel, let alone a request that the State be ordered to establish one.

Plaintiffs have never strayed from the course established in their complaints. To the contrary, at every stage of this litigation Faulkner has emphatically made clear that she has

no interest whatever in attending an all-female military program like The Citadel. For example, she testified in the district court as follows:

> Q. Now, what is your purpose in bringing this lawsuit?
>
> A. To be able to enter The Corps of Cadets and receive my full education from The Citadel.
>
> . . . .
>
> Q. You will not be happy going to a single-sex, all-female military college in South Carolina?
>
> A. I don't want a single-gender education.
>
> Q. And if South Carolina provided you with an all-female military college, that would not satisfy you?
>
> A. No, sir, it would not.[5]

2. Despite Faulkner's unequivocal denial of any interest in an all-female military program like The Citadel, the courts below required defendants to justify, in a two-week trial, the

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[5] J.A. 875, 884-85. *See also e.g.*, Brief of Appellee Shannon Faulkner at 1, *Faulkner II* (October 10, 1994) ("She [Faulkner] seeks a permanent injunction compelling her admission to The Citadel's Corps of Cadets. Ms. Faulkner does not seek a sex-segregated education. She desires access to the rigorous and disciplined education in a military environment offered by The Corps of Cadets program, which Defendants concede is unique in South Carolina."); Faulkner Petition at 19 ("Once a federal court finds that a state has unlawfully excluded a group of students from a public educational program, the only appropriate remedy is for the state to admit the excluded individuals and to remedy the effects of the prior discrimination."). Likewise, not only has the United States never sought the establishment of an all-female military program like The Citadel, it has consistently maintained that coeducation of The Citadel's Corps of Cadets is the only adequate remedy for defendants' alleged constitutional violation. *See, e.g.*, United States post-trial proposed findings of fact and conclusions of law at 85, ¶ 53 (June 14, 1994) ("Consequently, the admission of women to The Corps of Cadets, the remedy urged by plaintiff and the United States, is the only feasible remedial option before this Court."); Brief for the United States as Appellee at 40, 42-43, *Faulkner II* (October 10, 1994); Oral Argument Transcript at 35, *Faulkner II* (argument of Thomas Chandler, counsel for United States) (Jan. 30, 1995) ("Obviously, from the beginning our position is that the women need, are entitled to go to VMI or Citadel because that's the only remedy for their constitutional rights.").

State's failure to establish such a program. In so doing, the courts were proceeding in obedience to the Fourth Circuit's prior decision in *VMI I*, which committed the same jurisdictional error. As discussed earlier, *supra* at 3-4, in that case, as here, the United States focused its equal protection challenge exclusively on VMI's single-sex admission policy, and it consistently argued that coeducation is the only constitutionally adequate remedy.[6] Accordingly, the district court correctly concluded that the question whether the Commonwealth of Virginia "must operate a state-supported, all-female college is not an issue to be resolved in this lawsuit." *United States v. Virginia*, 766 F. Supp. at 1414-15. The Fourth Circuit, however, did not hesitate to resolve this issue, notwithstanding the fact that no one had raised it. After concluding that VMI's males-only admission policy was constitutionally justified under the equal protection standard established in *Hogan*, the court of appeals ruled against Virginia on the "larger question" of whether Virginia's failure to offer a single-sex VMI-type educational program to women was constitutionally justified by the Commonwealth's articulated goal of providing diversity in educational programs.

In this case, given the Fourth Circuit's binding precedent in *VMI I*, the only liability issue for trial was the adequacy of South Carolina's "justification" for not offering women an all-female military program like The Citadel. In reaching and adjudicating an issue that no party had raised, concerning a program that no plaintiff wanted, the courts below plainly exceeded the "case or controversy" limitation on federal judicial authority.

3. "The power to declare the rights of individuals and to measure the authority of governments . . . 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982), quoting *Chicago &*

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[6] *See* U.S. Petition at 26 n. 23 ("From the inception of this litigation, the United States has consistently sought admission of women to VMI as the appropriate remedy.")

Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892). It follows from this "bedrock" principle of Article III that "the party who invokes the court's authority [must] 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' " *Id.* at 472, quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). The injury alleged must be "distinct and palpable," it must be "fairly traceable to the defendant's allegedly unlawful conduct," and it must be "likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citations omitted). And "it is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Hays*, 63 U.S.L.W. at 4681 (citations and internal quotations omitted). These Article III standing principles "appl[y] with as much force in the equal protection context as in any other." *Id.*

The most critical point for purposes of this case is simply that the injury alleged by the plaintiff must be "personal." The inquiry into a plaintiff's standing requires, at its threshold, a careful judicial examination of a complaint's allegations," *Allen*, 468 U.S. at 752, to ensure not only that it alleges "an injury to a cognizable interest," but that "the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). It follows that a plaintiff challenging governmental action withholding a particular benefit must allege that he is in line to receive the benefit if he prevails. For example, over a century ago, this Court dismissed a challenge to the constitutionality of a state law disallowing a certain property tax deduction because the plaintiff had not alleged that he would be eligible to take the deduction but for the challenged statute. *Board of Supervisors v. Stanley*, 105 U.S. 305 (1882). Noting that the plaintiff would pay "the same amount of tax" and thus "would be in no better condition if the [challenged] law expressly authorized him to make the deduction," the Court asked:

> What legal interest has he in a question which only affects others? Why should he invoke the protection of the act of Congress in a case where he has no

> rights to protect? Are courts to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs?

Id. at 311. Similarly, in *Sierra Club*, this Court held that an environmental organization lacked standing to challenge the commercial development of certain property within a national forest because the organization "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development. Nowhere in the pleadings or affidavits did the [plaintiff] state that its members use [the property] for any purpose, much less that they use it in any way that would be significantly affected by the proposed [development]." *Id.* at 735. A host of other cases are to the same effect. *See, e.g., Hays*, 63 U.S.L.W. at 4682 (plaintiffs lacked standing to challenge purported racial gerrymandering when they did not live in challenged district); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (environmental organizations lacked standing to seek declaration concerning extraterritorial application of Endangered Species Act because allegations that members intend to visit foreign countries in the future insufficient to show "actual or imminent injury"); *Allen*, 468 U.S. at 755 (plaintiffs' allegations of stigmatization insufficient to confer standing because plaintiffs not personally denied equal treatment by the challenged discriminatory conduct); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) (labor union lacked standing to challenge arbitration provision of state labor law because employers may elect responses to an arguably unlawful strike other than seeking an injunction and agreeing to arbitrate); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (plaintiffs lacked standing to challenge racial discrimination in administration of city's criminal justice system because they had not alleged that they had been or would likely be subject to the challenged practices); *Roe v. Wade*, 410 U.S. 113 (1973) (married couple lacked standing to challenge anti-abortion statute because potential future injury too speculative); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (plaintiff lacked standing to challenge club's racially discriminatory membership policies because he had never applied for

membership); *Cf. United States v. SCRAP*, 412 U.S. 669 (1973) (allegations that defendant's actions would directly harm plaintiffs in their use of the natural resources of the Washington area sufficient to confer standing).

4. In this case, it is clear that Faulkner and the United States have alleged facts demonstrating their standing to litigate the only claim that they have raised – the constitutionality of The Citadel's single-sex admission policy. It is equally clear, however, that there is no "case or controversy" here concerning the State's failure to establish an all-female military program like The Citadel. First, neither plaintiff has even *asserted* a claim challenging the absence of such a program. Accordingly, as the district court in the *VMI* case concluded, "this issue is not before the Court." *United States v. Virginia*, 766 F. Supp. at 1414. *See Babbitt*, 442 U.S. at 305 (1979) (although lower court had on its own motion invalidated arbitration provision of state labor law, because plaintiffs "never contested the constitutionality of the arbitration clause . . . any ruling on the . . . provision would be wholly advisory").

Second, even if plaintiffs had asserted a claim challenging South Carolina's failure to provide an all-female military program like The Citadel, they plainly have not alleged facts that would support their standing to litigate such a claim. Neither complaint alleges that Faulkner (or the women whose interests are represented by the United States) personally desires to attend an all-female military program like The Citadel, that she would qualify for admission to such a program, and that she will seek to enroll in such a program if she prevails on her claim. To the contrary, plaintiffs have made clear that their sole interest is in admission of qualified females to The Citadel Corps of Cadets and that establishment of a separate program for women, as the United States put its, "plainly does not cure the constitutional violation that gave rise to this case – the complete exclusion of women from [The Citadel's] unique and celebrated program." U.S. Petition at 12. In other words, even if South Carolina had always had an all-female military program like The Citadel, plaintiffs' constitutional claim in this case would not have been affected in

the slightest. Clearly, then, plaintiffs here do not possess "such a personal stake in the outcome of the ["all-female Citadel"] controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).[7]

Finally, adjudication in this case of the question whether defendants were constitutionally required to establish an all-female military program like The Citadel violates the "redressability" requirement of Article III standing. "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party. . . . " *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Thus, a plaintiff, "to justify exercise of the court's remedial powers *on his behalf*," *id.* at 498-99 (emphasis supplied), must show that his alleged injury "is likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. In this case, any "remedy" ordering South Carolina to establish an all-female military program like The

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[7] The record of the trial in this case demonstrates starkly the validity of the theory of Article III's standing requirement. The requirement that the plaintiff demonstrate a distinct and palpable *personal* injury from the defendant's allegedly illegal conduct "reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." *Valley Forge Christian College*, 454 U.S. at 473. Only if the plaintiff is actually one of those persons can the courts be assured "that the legal questions presented . . . will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* at 472. Here, in the trial on the State's failure to provide an all-female military program like The Citadel, Faulkner and the United States were putatively representing the interests of women who *desire* such a program and would seek to enroll in such a program if it existed. Because they actively oppose the establishment of such a program, however, Faulkner and the United States resisted rather than promoted the need for and wisdom of such a program at every stage of the proceedings. For example, plaintiffs presented evidence that the establishment of an all-female institution would *stigmatize* any woman who attended such a program. J.A. 804; 812. Similarly, the plaintiffs' expert testified only as to potential demand among women for a coeducational Citadel. J.A. 851. The plaintiff made no attempt to establish the potential demand for an all-female military program like The Citadel. In short, in the proceedings before the district court, the defendants have been engaged in the futile exercise of trying to satisfy parties who expressly will not be satisfied.

Citadel will not "redress or otherwise . . . protect against injury to the complaining part[ies]." *Warth*, 422 U.S. at 499.[8]

B. The Absence Of An All-Female Military Institution Like The Citadel Is Constitutionally Justified By An Absence Of Student Demand For Such A Program

If the courts below, contrary to our submission above, had jurisdiction in this case to reach the question whether the absence of an all-female educational program is constitutionally justified in this case, we submit that they resolved it incorrectly. Our argument has two elements. First, we submit that a state can have no obligation under the Constitution to establish an educational program of *any kind* if there is no significant student demand for the program. Second, we submit that the inquiry relating to demand, in determining whether the State has any liability under the Equal Protection Clause in this case, is defined and delimited by the equal protection claim advanced by the plaintiffs in this case. Accordingly, the only demand inquiry that may be relevant to Faulkner's equal protection claim is demand for an all-female military program that mirrors The Citadel in its mission, its goals, and its educational philosophies and methodologies. Because there is no significant demand for an "all-female Citadel" in South Carolina, the absence of such a program does not violate the Equal Protection Clause. We elaborate on each of these points below.

1. In *Faulkner I*, the court of appeals made clear that the trial in this case would be governed by its holdings in *VMI I* (1) that "coeducation would so fundamentally change VMI's

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[8] Viewed from another perspective, the relief which Faulkner and the United States *have* requested – coeducation of The Citadel Corps of Cadets – would not redress the only injury that could be caused by South Carolina's failure to offer an all-female military program like The Citadel, *i.e.*, the lack of an opportunity for women to attend a *single-gender*, Citadel-type educational institution. *Cf. Allen*, 468 U.S. at 753 n.19 (The "redressability" component "of the constitutional standing inquiry . . . examines the causal connection between the alleged injury and the judicial relief *requested*.") (emphasis supplied).

military program that neither males nor females would receive the training which VMI offered through its single-gender program"; (2) that "homogeneity of gender . . . ha[d] been shown to be related to the essence of the education and training at VMI"; (3) that "scientific studies . . . supported the conclusion that single-sex education is pedagogically justifiable both for males and females"; (4) that, accordingly, "a single-gender policy was justified by an important state purpose and that the state could appropriately offer a single-gender military education"; but (5) that "Virginia's decision to offer this unique type of education only to men" was not adequately justified by its goal of providing diversity in educational offerings. *Faulkner I*, 10 F.3d at 231-32 (Faulkner Pet. 75a-77a). The Fourth Circuit specifically noted that the inquiry into a State's decision to provide single-sex facilities or programs "must take into account the nature of the difference on which the separation is based, the relevant benefits to and the needs of each gender, the *demand* (both in terms of quality and quantity), and any other relevant factor." *Id.* at 232 (Faulkner Pet. 77a-78a). (emphasis added).[9]

As previously noted, the trial on liability was thus limited by the district court to the issue of the State's "justification" for not offering an all-female military institution like The Citadel, and the central focus of the parties' evidentiary presentations was on the issue of female demand. The State's evidence demonstrated that there is not now, and never has been, any interest at all in an all-female Citadel in South Carolina, let alone enough demand among women to make such a program pedagogically or economically viable. *See* note 2, *supra*.[10]

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[9] Judge Hamilton, in dissent, specifically suggested that South Carolina's failure to establish an all-female military program like The Citadel would be constitutionally justified by proof of "a lack of sufficient interest by women for such an institution." 10 F.3d at 240 (Faulkner Pet. 94a).

[10] The record in this case is indisputably clear that the overall educational benefits of South Carolina's system of higher education flow evenly to men and women. Indeed, in some respects, South Carolina's system of higher education benefits women to a greater degree than it benefits men. In the 1992-93 academic

Neither Faulkner nor the United States made any attempt to rebut the State's evidence of lack of demand for an all-female military program like The Citadel. To the contrary, both plaintiffs *corroborated* this evidence, making clear that neither Faulkner herself nor the women represented by the United States had any interest in attending such an institution. Rather, Faulkner and the United States focused their efforts at trial on attempting to establish that there is female demand for *coeducation* at The Citadel.

2. In its findings of fact, the district court specifically concluded that "[i]t is and has been the policy of the State of South Carolina to provide educational opportunities in its system of higher education when dictated by its policies of responding to reasonable demand, student choice, institutional autonomy, diversity, and economy of resources." 858 F. Supp. at 560 (Faulkner Pet. 46a); *see id.* at 564 (Faulkner Pet. 54a). The district court also specifically found that "[t]here does not appear to be any substantial interest in South Carolina for the establishment of an all-female military institution like The Citadel." *Id.* at 560 (Faulkner Pet. 46a). Notwithstanding these findings, the district court concluded, as a matter of law, that the lack of demand for an all-female Citadel is irrelevant as a justification for the State's failure to provide such a program. *Id.* at 564-65 (Faulkner Pet. 55a-57a). The court based its ruling on pre-*Brown v. Board of Education*, 347 U.S. 483 (1954), decisions of this Court holding that limited demand among blacks did not excuse a State's failure to provide "separate-but-equal" educational programs and facilities for those blacks who sought them. *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *McCabe v. Atchison, T. & S. F. Ry.*, 235 U.S. 151 (1914).

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year, for example, South Carolina awarded women 64% of the state's tuition grants (J.A. 1009); 71,015 women and 54,896 men enrolled in South Carolina public institutions of higher education (J.A. 995); and 8,390 women, as compared with 6,551 men, were awarded degrees in South Carolina. (J.A. 991.) South Carolina also showed that it provides public support for single-gender education for women through its tuition grants program.

In the court of appeals, only two members of the panel addressed the district court's findings concerning demand.[11] Judge Niemeyer, author of the majority opinion, first expressed doubt about the validity of the district court's legal conclusion that the question of demand is constitutionally irrelevant:

> For example, if a state chooses to offer single-gender education to each gender and if no person of one gender applies, is the state therefore precluded from offering single-gender education to the other gender? The question becomes yet more complex when we consider a single-gender educational program which requires a substantial outlay of capital. May the state require as a condition of providing the program that a minimum number of each gender, necessary to render the program viable, apply?

51 F.3d at 445 (Faulkner Pet. 7a-8a). Judge Niemeyer did not resolve this "difficult legal issue," however, because he concluded that the State had "failed to present evidence from which the court could conclude that there was an absence of demand among women *for public single-gender education*." *Id.* at 444-45 (emphasis added) (Faulkner Pet. 8a-9a). It is important to note that Judge Niemeyer did not question – and in light of the undisputed record in this case, could not responsibly have questioned – the validity of the district court's finding that there is no significant interest in an all-female military institution like The Citadel. Rather, Judge Niemeyer focused on the broader (and we believe irrelevant) issue of female demand for single-gender education in general. With the inquiry thus broadly defined, Judge Niemeyer concluded that "the state's failure to offer single-gender education to women" is not justified since "an absence of demand among women for such education has not been demonstrated." *Id.* at 446 (Faulkner Pet. 9a).

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[11] In a concurring opinion, Judge Hall expressed the view that The Citadel's males-only admission policy is *per se* unconstitutional and that any inquiry into the State's failure to provide an institution for women is therefore "irrelevant." 51 F.3d at 450-51 (Faulkner Pet. 18a-20a).

Judge Hamilton, in contrast, focused in his dissenting opinion on female demand for an all-female military program like The Citadel. Noting that in the *VMI* case, "the issue of demand was neither raised nor addressed," *id.* at 454 (Faulkner Pet. 26a), Judge Hamilton emphasized that "The Citadel put on unrebutted evidence" of the lack of female demand for an all-female Citadel. *Id.* at 453 (Faulkner Pet. 23a). Accordingly, the pertinent demand issue was not in dispute: "[A]s all parties and the district court agree, there is absolutely no demand for a 'female Citadel.' " 51 F.3d at 456 (Faulkner Pet. 30a). Because "lack of demand is a gender-neutral, nonin-vidious, substantial justification" for not providing a Citadel-type institution for women, Judge Hamilton concluded that the State had not offended the Equal Protection Clause. *Id.*

3. We submit that the lack of demand in South Carolina for an all-female military institution like The Citadel, which was amply demonstrated by unrebutted evidence at trial, constitutes a complete defense to any claim that the absence of such a program in South Carolina violates the Equal Protection Clause.[12] The common sense of the matter is reflected in the question, asked by Judge Niemeyer and excerpted above (*supra* at 25), whether a state is constitutionally precluded from providing to males (or females) a pedagogically beneficial single-sex educational program for which there is a large student demand if the state does not also offer to females (or males) a single-sex educational program for which there is no significant demand, and which, therefore, would be empty or virtually so. The Equal Protection Clause does not require that state officials suspend their common sense, in the field of

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[12] It is clear that the State has applied the gender-neutral criterion of student demand in a gender-neutral manner. The State introduced evidence that if the levels of demand by male and female students for a single-sex Citadel-type educational program had been reversed, the State's decisions concerning educational offerings would likewise have been reversed. For example, former Governor West testified at the trial that "if The Citadel had been vacating barracks and not using the facilities, then [the State] probably would have" examined the continued viability of The Citadel, just as the State reexamined the single-gender status at all-female Winthrop College when enrollment at that school declined. J.A. 361. *See also* J.A. 525, 540-43.

education or in any other context in which single-sex facilities or activities are supported by an "exceedingly persuasive justification." The contrary reasoning of the district court and Circuit Judge Hall casts doubt on the validity of a range of governmental activities in which programs or facilities are provided only for one sex, such as the provision of shelters for battered women.[13]

This Court's race discrimination cases from the separate-but-equal era do not counsel otherwise. *See Missouri ex rel. Gaines*, 305 U.S. at 350-51; *McCabe*, 235 U.S. at 101. Under the pre-*Brown* equal protection standard applicable in those cases, a state's exclusion of blacks, even a single black, from a state-supported educational program was permissible *only* if the state provided a separate-but-equal program to blacks. Separation of the races does not confer any benefit. Separation of the sexes in single-gender education, however, has been proven to be pedagogically beneficial to many college students, both male and female. Accordingly, the pre-*Brown* race cases are devoid of analytical force and irrelevant to Faulkner's and the United States' claims. Furthermore, the pre-*Brown* cases are justly discredited, and there is and can be no justification for excluding an individual from a state-supported educational program on the basis of race.

This Court has long recognized, however, that "where [a] gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances," the gender classification should be upheld. *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion). In keeping with this point, this Court has made clear that single-gender educational programs

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[13] *See also Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1995) (absent significant demand among female prisoners, state need not provide same training programs at all-female prison that are provided at all-male prison), *cert. denied*, ___ U.S. ___, 1995 U.S. LEXIS 1538 (U.S. 1995); *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (upholding exclusion of males from all-female volleyball team notwithstanding absence of any all-male volleyball team); *but see, e.g., Saint v. Nebraska School Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988) (unconstitutional to exclude females from male wrestling team where no female wrestling team).

are not *per se* unconstitutional, but rather are permissible if they are substantially related to the achievement of important governmental objectives. *Hogan*, 458 U.S. at 730. In upholding the males-only admission policies of both The Citadel and VMI, the Fourth Circuit found, based on an unrebutted record of expert testimony and scholarly literature, that a single-sex educational environment is pedagogically beneficial to a substantial number of college students, both male and female. The court of appeals also held, again based on largely uncontradicted evidence, that the pedagogical benefits of single-sex higher education, and especially the benefits to adolescent males flowing from the harsh "adversative" educational method practiced by The Citadel and VMI, would be lost if the Corps of Cadets were coeducated. Given that the admission policy is constitutionally justified, it follows as a matter of common sense that the admissions policy should not be struck down due to the absence of an all-female military program for which there is no demand.

The court of appeals' error with respect to the issue of demand, however, stems not from a failure to recognize its relevance (only Judge Hall denied the relevance of demand for an all-female military institution), but rather in broadly defining the inquiry in this case as demand among females for single-gender higher education generally, as opposed to demand for an "all-female Citadel." Even if we are wrong in our submission concerning the lack of justiciability in this case of any liability issue concerning the absence of an all-female program that both plaintiffs renounce, neither Faulkner nor the United States would alter their equal protection claim in the slightest if the State provided a wide range of all-female educational programs, including one like the Citadel's. Accordingly, the only focus on demand in the context of plaintiffs' liability claims should be that for an all-female Citadel. Faulkner is not seeking admission to an all-male liberal arts college, so the level of demand among females for such a single-sex liberal arts education is simply irrelevant to the liability claim asserted in this case.

Accordingly, the district court's finding, based on unrebutted evidence, that there is no "substantial interest in South

Carolina for the establishment of an all-female military institution like The Citadel," 858 F. Supp. at 560 (Faulkner Pet. 46a), is a complete answer to the claim that the State has a constitutional obligation to provide such a program in place of The Citadel. The court of appeals clearly erred in holding otherwise. Given that the continued existence in this country of single-gender public higher education hangs in the balance, the issues related to student demand raised by this case amply warrant this Court's plenary review.

4. We note, finally, that the relief ordered by the courts below – admission of Faulkner into The Citadel's Corps of Cadets – is wholly at war with the rationale of the Fourth Circuit's holding that The Citadel's single-sex admission policy serves legitimate, important State objectives. Again, the court of appeals correctly concluded that The Citadel's all-male adversative educational environment is "pedagogically justifiable," *VMI I*, 976 F.2d at 897, and that ordering "the admission of women to [The Citadel] . . . would deny those women the very opportunity they sought because the unique characteristics of [The Citadel's] program would be destroyed by coeducation." *Id.* Yet, the court of appeals concluded, paradoxically, that the district court here could appropriately order Faulkner's admission to The Citadel's Corps of Cadets as a "remedy" for the State's failure to provide to women a Citadel-type program – a "remedy" that the court itself recognized would not provide to Faulkner the unique and pedagogically beneficial educational experience that she seeks and would simultaneously deny those benefits to the cadets who have sought and now enjoy them. If the Fourth Circuit correctly concluded that the State was constitutionally obliged to provide an all-female educational program, it follows that the court erred in effectively ordering the coeducation of The Citadel rather than establishment of such an all-female program.

VI. CONCLUSION

For the foregoing reasons, the State of South Carolina and The Citadel respectfully request that this petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be granted and the case be set for plenary review.

Respectfully submitted,

M. Dawes Cooke, Jr.
Barnwell, Whaley, Patterson & Helms
134 Meeting Street
Charleston, South Carolina 29402
(803) 577-7700

Robert H. Hood
Hood Law Firm
172 Meeting Street
P. O. Box 1508
Charleston, South Carolina 29402
(803) 577-4435

**Counsel of Record*

Charles J. Cooper*
Michael A. Carvin
Vincent J. Colatriano
David H. Thompson
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Charles Molony Condon
Attorney General for the State of South Carolina
Treva G. Ashworth
Kenneth P. Woodington
Cameron B. Littlejohn, Jr.
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970

Dated: August 11, 1995

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated,
Plaintiff,

v.

JAMES E. JONES, JR., Chairman, Board of Visitors of The Citadel, the Military College of South Carolina; CARROLL A. CAMPBELL, JR., T. EASTON MARCHANT, BARBARA S. NIELSEN, WILLIAM F. PRIOLEAU, JR., WILLIAM E. JENKINSON, III, LEONARD C. FULGHUM, JR., JAMES M. LELAND, JR., JOHN A. McALLISTER, JR., DAVID S. BOYD, JR., JULIAN G. FRASIER, III, JAMES W. BRADIN, LARRY J. FERGUSON, and STEVE D. PEPER, Members of the Board of Visitors of the Citadel, The Military College of South Carolina; WALLACE I. WEST, JR., Director of Admissions and Recruiting at The Citadel, the Military College of South Carolina, CLAUDIUS E. WATTS, III, President of The Citadel, The Military College of South Carolina, in their official capacities.
Defendants.

COMPLAINT

(Filed March 2, 1993)

Civil Action No. 2 93 0488 2

I. Preliminary Statement

1. This is an action for declaratory and injunctive relief under 42 U.S.C. Section 1983 to redress violations of the right to equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiff alleges that defendants engage in unconstitutional sex discrimination in their categorical exclusion of qualified women from The Citadel, The Military College of South Carolina (hereinafter "The Citadel"), a state supported and state operated institution. Plaintiff asserts that she would have been admitted to the Corps of Cadets if she was a male, but that she has been determined ineligible solely on the basis of sex. Plaintiff seeks admission to the Corps of Cadets.

II. Jurisdiction and Venue

2. The Court has jurisdiction pursuant to 28 U.S.C. Section 1343(3) and 28 U.S.C. Section 1331. The Court is authorized to grant declaratory relief and other relief under 28 U.S.C. Sections 2201 and 2202.

3. Venue is properly in this Court pursuant to 28 U.S.C. Section 1391(b).

III. Plaintiff

4. Plaintiff, SHANNON RICHEY FAULKNER, is a resident and domiciliary of Pickins County, State of South Carolina, and a student of the South Carolina Public School system. Plaintiff applied for admission to The Citadel. After being provisionally admitted to the Corps

of Cadets on her merits, The Citadel revoked her acceptance after discovering that Plaintiff was female.

IV. Class Action Allegations

5. Plaintiff FAULKNER asserts claims under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution on her behalf and, pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, on behalf of all persons similarly situated. Plaintiff represents a class of all women who are denied admission as a result of their sex from the Corps of Cadets. The class meets all requirements of Rule 23(b)(2) in that:

(a) The members of the class are so numerous that joinder of all class members is impracticable;

(b) There are common questions of law and fact, including without limitation whether defendants' policy categorically to exclude all women from the Corps of Cadets violates the right to equal protection under the law;

(c) The claims of the representative plaintiff is typical of the claims of the class, and the representatives will fairly and adequately protect the interests of the class; and,

(d) Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

V. Defendants

6. The Board of Visitors of The Citadel is responsible for the governance and operation of The Citadel and for prescribing the terms upon which students may be admitted to The Citadel. The individual members of the Board of Visitors, who are collectively responsible for the governance and operation of The Citadel, are JAMES E. JONES, JR., Chairman, CARROLL A. CAMPBELL, JR., (Ex-Officio), T. EASTON MARCHANT (Ex-Officio), BARBARA A. NIELSEN (Ex-Officio), WILLIAM F. PRIOLEAU, JR., WILLIAM E. JENKINSON, III, LEONARD C. FULGHUM, JR., JAMES M. LELAND, JR., JOHN A. McALLISTER, JR., DAVID S. BOYD, JR., JULIAN G. FRASIER, III, JAMES W. BRADIN, LARRY J. FERGUSON and STEVE D. PEPER. Composition of the Board of Visitors of The Citadel is determined pursuant to Section 59-121-10, South Carolina Code of Laws, as amended (Lawyers Co-op., 1976).

7. Defendant CLAUDIUS E. WATTS, III is President of The Citadel, and as such is responsible for its overall supervision, management and operation.

8. Defendant WALLACE I. WEST, JR., is Director of Admissions and Recruiting at The Citadel as such is responsible for admitting students into the Corps of Cadets.

9. All individual defendants named herein reside within the State of South Carolina. All are sued in their official capacities. Each defendant has acted under color of law with regard to all matters alleged herein.

VI. Facts

10. The Citadel offers a full-time undergraduate program (the "Day Program") called the "Corps of Cadets". The Citadel admits male students to its Corps of Cadets. The Corps of Cadets is comprised of over 1,800 male undergraduate students residing in four (4) barracks on campus where they are given a liberal arts education in a military environment. All members of the Corps of Cadets are male.

11. Males enrolled in the Corps of Cadets may choose from seventeen baccalaureate majors.

12. Plaintiff applied to The Citadel in January 1993. In applying, she requested for her high school to delete her gender from her transcript. Plaintiff was truthful on her application and never presented herself as a male. Instead, Plaintiff's transcript was gender neutral. The application to The Citadel does not specify gender nor require a picture.

13. On or about January 22, 1993, Plaintiff received a provisional acceptance letter from The Citadel. This letter stated that to be fully accepted she must:

(a) complete all designated academic courses;

(b) provide a final high school transcript verifying her graduation, grade point ratio and class standing;

(c) gain medical approval by completing a medical form;

(d) sign and return the drug testing form.

Plaintiff was prepared to complete the foregoing.

14. On or about February 10, 1993, Defendant WALLACE I. WEST, JR., wrote Plaintiff a letter revoking her provisional acceptance on the grounds that they had discovered she was a female and that The Citadel only admits men to the Corps of Cadets;

15. Plaintiff satisfied all content or merit based criteria for admission to the Corps of Cadets, is fully qualified for admission and, but for her sex, would have been admitted;

16. Solely because Plaintiff is female, The Citadel revoked her acceptance;

17. Had the Plaintiff not submitted a gender neutral transcript, her merits would have not even been reviewed. All former applicants who were female and whose data stated such were summarily rejected by The Citadel solely on the basis of gender.

18. The Citadel is the only military college in the State, is supported by state taxation monies and discriminates on the basis of gender.

VII. Violation of Law

19. Defendants' actions in denying Plaintiff admission to the Corps of Cadets discriminates against the Plaintiff on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. Section 1983.

VIII. Prayer for Relief

WHEREFORE, Plaintiff prays that this Court:

(a) Permanently enjoin the defendants, their officers, agents, employees, successors, assigns, representatives, and all persons in active concert or participation with them from discriminating on the basis of sex in admitting qualified women, to the Corps of Cadets;

(b) Order that Plaintiff's provisional admission be reinstated and that Plaintiff be admitted to the Corps of Cadets;

(c) Grant reasonable attorneys fees, costs and expenses pursuant to 42 U.S.C. Section 1988;

(d) Adopt procedures to insure that other qualified women applicants are admitted to the Corps of Cadets at The Citadel;

(e) Grant such other additional relief as it deems just and proper.

/s/ Suzanne Coe
Suzanne E. Coe #5394
RANDALL S. HILLER, P.A.
P.O. Box 1716
Greenville, S.C. 29602-1716
(803) 232-0026

/s/ Stephen J Henry
Stephen J. Henry #1831
TAYLOR & HENRY
501 McBee Avenue, Ste. 101
Greenville, S.C. 29601
(803) 232-9700

/s/ Robert R. Black
Robert R. Black #4179
23 Broad Street
P.O. Box 643
Charleston, S.C. 29402
(803) 577-5806

SHEARMAN & STERLING

By: /s/
Henry Weisburg
Jonathan L. Greenblatt
Valorie K. Vojdik
153 East 53rd Street
New York, New York 10022
(212) 848-4000

/s/
Isabelle Katz Pinsler
Sara A. Mandelbaum
132 West 43rd Street
New York, New York 10036
(212) 944-9800 ext. 521,525

Greenville, S.C.
March 2, 1993

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SHANNON RICHEY FAULKNER, Individually and on behalf of all others similarly situated

Plaintiff,

and the
UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

JAMES E. JONES, JR., Chairman, Board of Visitors of The Citadel, the Military College of South Carolina, CARROLL A. CAMPBELL, JR., Governor of the State of South Carolina, T. ESTON MARCHANT, Adjutant General of the State of South Carolina, BARBARA S. NIELSEN, Superintendent of Education of the State of South Carolina, WILLIAM F. PRIOLEAU, JR., WILLIAM E. JENKINSON, III, LEONARD C. FULGHUM, JR., JAMES M. LELAND, JR., JOHN A. MCALLISTER, JR., DAVID S. BOYD, JR., JULIAN G. FRASIER, III, JAMES W. BRADIN, LARRY J. FERGUSON, and STEVEN D. PEPER, Members of the Board of Visitors of The Citadel, the Military College of South Carolina; WALLACE I. WEST, JR., Director

Civil Action
No. 2 93 0488 2

(Filed
June 7, 1993)

of Admissions and Recruiting at The Citadel, the Military College of South Carolina, CLAUDIUS E. WATTS, III, President of The Citadel, the Military College of South Carolina, in their official capacities,

Defendants,

and THE STATE OF SOUTH CAROLINA, THE CITADEL, the Military College of South Carolina, and THE BOARD OF VISITORS OF THE CITADEL, the Military College of South Carolina,

Added Defendants.

COMPLAINT-IN-INTERVENTION

The United States of America alleges that:

1. This action, which was commenced on March 2, 1993, seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution on account of sex, is a case of general public importance and has been so certified by the Attorney General of the United States pursuant to Title IX of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000h-2.

2. This complaint-in-intervention is timely.

3. Jurisdiction over the original complaint arises under 42 U.S.C. §1343(3) and §1331. Jurisdiction over this complaint-in-intervention arises additionally under 28 U.S.C. §1345 and 42 U.S.C. §2000h-2.

4. Added defendant the State of South Carolina has created and authorizes operation of, including the expenditure of public funds for, public colleges, one of which is The Citadel.

5. Added defendant The Citadel, The Military College of South Carolina (The Citadel), is a public institution organized and existing under the laws of the State of South Carolina. The Citadel is located in Charleston, South Carolina.

6. Added defendant the Board of Visitors of The Citadel, the Military College of South Carolina, is a body corporate and politic of the State of South Carolina and has responsibility for governing and administering The Citadel.

7. Defendant Carroll A. Campbell is Governor and chief executive officer of the State of South Carolina and an *ex officio* member of the Board of Visitors of The Citadel and is being sued in these capacities. Governor Campbell maintains his offices in Columbia, South Carolina.

8. Defendant Barbara S. Neilsen is the State Superintendent of Education and an *ex officio* member of the Board of Visitors and is sued in these capacities. State Superintendent Neilsen maintains her office in Columbia, South Carolina.

9. Defendant Claudius E. Watts, III is the President of The Citadel and is being sued in this capacity.

10. Defendants James F. Jones, Jr. is the Chairman of the Board of Visitors of The Citadel, and, William F.

Prioleau, Jr., William E. Jenkinson, III, Leonard C. Fulghum, Jr., James M. Leland, Jr., John A. McAllister, Jr., David S. Boyd, Jr., Julian G. Frasier, III, James W. Bradin, Larry J. Ferguson, and Steven D. Peper are members of the Board of Visitors of The Citadel, respectively, and are being sued in this capacity.

11. Defendant Major General T. Eston Marchant, Adjutant General of South Carolina, is an *ex officio* member of the Board of Visitors of The Citadel and is being sued in this capacity.

12. Defendant Wallace I. West, Jr., is Director of Admissions and Recruiting at The Citadel and is being sued in this capacity.

13. Defendants named in paragraphs 4-12 are responsible for the operation of The Citadel.

14. Defendants named in paragraphs 4-12 reside within the State of South Carolina.

15. Defendants have engaged in discrimination on the basis of sex by maintaining a policy of restricting admission to the four-year daytime undergraduate degree program, the Corps of Cadets of The Citadel, to males only, and by refusing to consider qualified females for admission to that program.

16. This discrimination on the basis of sex constitutes a denial of equal protection under the Constitution and laws of the United States.

WHEREFORE, the United States prays that this Court:

1. Declare that the defendants have unlawfully discriminated on the basis of sex by refusing to admit or consider the admission of qualified females to The Citadel in violation of the Constitution and laws of the United States;

2. Permanently enjoin the defendants, their officers, agents, employees, successors, assigns, and all persons in active concert or participation with them from all unlawful discrimination on the basis of sex in the operation of The Citadel; and

3. Order defendants to formulate, adopt, and fully and timely implement a plan to remedy fully their discriminatory policies and practices and to comply with the requirements of federal law including the Fourteenth Amendment to the Constitution of the United States.

The United States further requests that this Court grant such other additional relief as it deems just and proper.

/s/ Janet Reno
JANET RENO
Attorney General

/s/ James P. Turner
JAMES P. TURNER
Acting Assistant Attorney General

/s/ John H. Douglas AUSA
for MARGARET B. SEYMOUR
United States Attorney

/s/ Nathaniel Douglas
NATHANIEL DOUGLAS
Chief

/s/ Sandra Lynn Beber
SANDRA LYNN BEBER
Attorney
U.S. Department of Justice
Civil Rights Division
Educational Opportunities
Litigation Section
Washington, D.C. 20530
(202) 514-4092

APPENDIX C

Shannon Richey FAULKNER, individually and on behalf of all others similarly situated; United States of America, Plaintiffs/Appellees,

v.

James E. JONES, Jr., Chairman, Board of Visitors of The Citadel, the Military College of South Carolina; Carroll A. Campbell, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; T. Easton Marchant, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Barbara S. Nielsen, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; William F. Prioleau, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; William E. Jenkinson, III, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Leonard C. Fulghum, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; James M. Leland, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; John A. McAllister, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; David S. Boyd, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Julian G. Frasier, III, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Larry J. Ferguson, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Steve D. Peper, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Wallace I. West, Jr., Director of Admissions and

Recruiting at The Citadel, the Military College of South Carolina; Claudius E. Watts, III, President of The Citadel, the Military College of South Carolina; State of South Carolina; The Citadel, the Military College of South Carolina; the Board of Visitors of The Citadel, the Military College of South Carolina, Defendants Appellants.

No. 93-2030 (CA-93-488-2).

United States Court of Appeals,
Fourth Circuit.

Jan. 11, 1994.

PRIOR REPORT: 10 F.3d 226

ORDER

Appellants have filed a motion to stay the mandate pending application to the Supreme Court of the United States for a writ of certiorari and appellee filed a response to the motion.

The Court denies the motion.

Entered at the direction of Circuit Judge NIEMEYER, with the concurrence of Circuit Judge K.K. HALL.

Circuit Judge HAMILTON dissents from the denial of the motion and has filed a separate written dissent.

HAMILTON, Circuit Judge, dissenting:

Before issuing a mandate which compels The Citadel to jettison 151 years of distinguished educational tradition, I believe we should afford the Supreme Court an opportunity to consider two compelling questions of national importance which have not yet been addressed.

I, therefore, dissent from the majority's decision to deny the motion for stay of mandate pending application for writ of certiorari.

First, the preliminary injunction affirmed by the majority invokes issues of comity and federalism. Before The Citadel is required to transform itself, I believe the Supreme Court should be afforded the opportunity to consider whether a federal court may properly impose a remedy for a constitutional violation without first providing the state the right to devise and implement its own remedy. In my view, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), and its progeny require a federal court to refrain from imposing a particular remedy on a state, even on a preliminary basis, *before* the state has had the opportunity to fashion a remedy from a variety of permissible alternatives.

Second, the Supreme Court should also be afforded an opportunity to consider a novel issue under the Equal Protection Clause. Specifically, The Citadel claims that, under *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), and its progeny, including our decision in *VMI*, 976 F.2d 890 (4th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993), establishing a lack of demand by women for a Citadel-type education would justify South Carolina's decision to provide such educational opportunities only to men. Faulkner rejects this argument, asserting that a lack of demand can never justify a state's decision to deprive a lone woman of the same educational opportunities which the state provides to men. Even the majority could not reach a consensus on this

question. *Compare Faulkner v. Jones*, 10 F.3d 226 (4th Cir.1993) ("[A]ny analysis of the nature of a separate facility [for women] . . . must take into account . . . the demand (both in terms of quality and quantity. . . .), *with Id.* at 231 (Hall, J., concurring) ("I question whether, under the Equal Protection Clause, a state can ever have a sufficiently important interest to justify expending funds to maintain an institution that not only practices inequality, but celebrates it."). Before the State of South Carolina undertakes the costly and timely discovery to establish such a lack of demand in a trial on the merits, I believe the Supreme Court should first be afforded the opportunity to rule, as a matter of law, whether such lack of demand would, under the intermediate scrutiny applicable to gender-based discrimination claims, justify a state's failure to provide equal educational opportunities to both genders.

It could be argued that, if the Supreme Court wishes to review these important constitutional questions, it could issue its own stay. Such an argument, in my opinion, abrogates the responsibility of this court by ignoring the appropriate inquiry which we are bound to undertake when deciding whether to grant such a stay. Specifically, Fourth Circuit I.O.P. 41.2 allows this court to grant such a stay if the matter raises a "substantial question" or "set[s] forth good or probable cause for a stay." Unquestionably, the two questions previously discussed qualify as "substantial." In addition, the failure of the majority to reach a consensus on the second question clearly provides "good or probable cause for a stay." Such undefined parameters of our Constitution should be explored before, rather than after, we compel The Citadel to transform itself. *See,*

e.g., Virginia Military Institute v. United States, ___ U.S. ___, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993), where Justice Scalia opined:

> Whether it is constitutional for a State to have a men-only military school is an issue that should receive the attention of this Court before, rather than after, a national institution as venerable as the Virginia Military Institute is compelled to transform itself.

Finally, I note that we afforded VMI a similar stay on *two separate occasions*. I see no reason why The Citadel should not be afforded the same privilege, especially since the mandate in this case "compels [The Citadel] to transform itself," while the mandate in *VMI* did not disrupt that school's on-going educational program. *Virginia Military Institute*, ___ U.S. at ___, 113 S.Ct. at 2431 (1993). I realize that, unlike *VMI*, this case contains "time pressure" and "the absence of [other] opportunity" for Faulkner, and I am certainly sympathetic to a young woman's desire to attend the college of her choice. However, if the Supreme Court denies certiorari, then granting The Citadel's motion will have delayed Faulkner's attendance at The Citadel by only one semester. Surely, Faulkner could endure a one semester delay while the Supreme Court decides whether to address the nationally important and unresolved constitutional issues presented by this case.

In summary, this case involves at least two significant constitutional questions which the Supreme Court has not yet addressed. Even the majority failed to reach a consensus on the latter issue. In light of the important and unresolved constitutional questions inherent in this

matter, I believe this court should stay its mandate pending The Citadel's application for writ of certiorari. I, therefore, dissent from the majority's denial of the motion for such a stay.